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No. 82-91

IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

PADUNGSRI PHINPATHYA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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REASONS FOR DENYING WRIT.

Petitioner's Petition for Writ of Certiorari should be denied for the following reasons:

As to the Respondent the Issue Presented Is Moot.

As to the Respondent, Padungsri Phinpathya, the issue has become moot. The issue involved is whether Respondent has satisfied the requirement of 8 U.S.C. §1254(a)(1) of having ". . . been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application . . ." Assuming, for the sake of this argument only, that Respondent's period of continuous physical presence in the United States began on April 18, 1974, upon her return from her brief absence she has, since that date, completed in excess of the seven year continuous physical presence requirement

of the statute. Respondent could, at this time, apply to have her deportation hearing reopened in order to file a new application for suspension of deportation, alleging a new seven year continuous physical presence dating from April 18, 1974, a period of over eight years. Since Respondent could, without any determination by this Court of the merit of Petitioner's Petition, clearly meet the statutory requirement of 8 U.S.C. §1254(a)(1), this Court should deny the Petition on the basis that the issue, as to Respondent, is moot.

Petitioner Has Misstated the Congressional Intent in That the Remedy of Suspension of Deportation Should Be "Generously Construed."

Petitioner, in its Petition for Writ of Certiorari, has misstated the Congressional intent in providing the statutory remedy of suspension of deportation. Petitioner states that the decision below, as well as the court's decision in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979) were

> ". . . based on the erroneous assumption that Congress intended Section 244(a)(1) [8 U.S.C. §1254(a)(1)] 'to be generously construed.' " (Petitioner's Brief, p. 10).

Respondent submits that these two Ninth Circuit cases correctly identify the intent of Congress in enacting 8 U.S.C. §1254(a)(1), and that Petitioner's position, that Congress intended a narrow and strict interpretation of the statute, is incorrect and not based on sound authority.

Petitioner cites *McColvin v. INS*, 648 F.2d 935 (4th Cir. 1981) for the proposition that on its face 8 U.S.C. §1254(a)(1)

> "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation," 648 F.2d at 937,

and that Congress intended that the continuous physical presence requirement ". . . be applied in a rigorous manner," 648 F.2d at 938. In fact, however, the court did not make its decision based on that *dicta*, but rather held that the alien was not eligible for 8 U.S.C. §1254(a)(1) relief under the Ninth Circuit *Kamheangpatiyooth* formulation of the statute. The court further stated that since this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), and the Ninth Circuit decision in *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964), the word "continuous" has not been subject to a "hard and fast construction." 648 F.2d at 937. The court went on to allow that

> "The parties in the present case agree that the continuous physical presence requirement may be relaxed in an appropriate case. They differ, however, on the degree of relaxation that should be allowed and on whether this case is an appropriate one for such relaxation." 648 F.2d at 937.

At most, the court's decision in *McColvin v. INS, supra*, can be cited for the proposition that the specific facts of that case did not make it an appropriate case in which to relax the continuous physical presence requirement.

Respondent submits that the Ninth Circuit has more accurately adhered to the Congressional intention in creating 8 U.S.C. §1254(a)(1). In discussing the suspension of deportation statute in conjunction with 8 U.S.C. §1101(a)(13), the court stated in *Kamheangpatiyooth v. INS, supra:*

> "Both sections therefore must be interpreted in light of the congressional purpose. Both sections are remedial, and hence are to be generously construed. More specifically, both sections are intended to relieve aliens of the harsh results, and of the unsuspected risks and unintended consequences, that would flow from a literal and rigid application of the provisions of the

> Act relating to expulsion and exclusion." 597 F.2d at 1256.

The legislative history shows that Congress' intention in enacting the suspension of deportation statute was remedial in nature and meant to ameliorate the hardships of deportation.

> "It is the information of the committee that there are a number of worthy cases in which persons, deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief. . . . It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief." S. Rep. No. 1204, 80th Cong., 2d Sess. (1948).

And prior to the amendment of the Immigration and Nationality Act in 1948, which extended suspension of deportation to aliens who had seven or more years residence in the United States, "Immigration and Naturalization Service officials stated that the law was too stringent. . . ." S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

Petitioner argues that Congress must have intended the seven year continuous physical presence requirement to be interpreted narrowly because of the exceptional nature of the suspension remedy. However, as was pointed out by the court in *Kamheangpatiyooth*, a liberal interpretation of the continuous physical presence requirement would not result in a reduction of the exceptional quality of the remedy.

> "A generous construction of the continuous presence requirement of §244(a)(1) [8 U.S.C. §1254(a)(1)] is also especially appropriate because it will not require relief to be granted where relief may be unwarranted. Indeed, a liberal construction will not require the grant-

ing of relief in any case; it will only allow the Attorney General to review the case on the merits and to decide whether in his discretion relief in fact would be warranted." 597 F.2d at 1256, footnote 3.

The fact that an alien may meet the seven year continuous physical presence requirement is by no means determinative of the suspension application. To the contrary, the alien must demonstrate good moral character and make the showing that deportation would result in "extreme hardship." It is this latter requirement which characterizes the suspension remedy as an exceptional remedy. A liberal interpretation of the continuous physical presence requirement would not denigrate the exceptional quality of the suspension of deportation regulation.

A generous interpretation of the seven year continuous physical presence requirement of 8 U.S.C. §1254(a)(1) as adopted by the Ninth Circuit accurately complements the intention of Congress in enacting the suspension of deportation remedy.

The Decision Below Is Not in Conflict With the Decisions in Other Circuits in That Each Circuit Has Applied the Same Test of Significant Interruption to Decide Each Case on Its Individual Facts.

The decision of the court below is not in conflict with decisions of the other Courts of Appeals that have considered the issue of significant interruption of the continuous physical presence requirement.

Petitioner asserts that the decision below is in conflict with the Second Circuit's decision in *Heitland v. INS*, 551 F.2d 495, cert. denied, 434 U.S. 819 (1977). Although opposite results are reached in the two cases involving substantially similar facts, the fact is that both courts applied the same law but reached opposite conclusions based on the

specific facts of each case. The *Heitland* court correctly stated the applicable case law which holds that the alien must show that any departure during the statutory seven year period did not meaningfully interrupt his continuous physical presence in the United States. See *Rosenberg v. Fleuti, supra*, and *Wadman v. INS, supra*.

> ". . . the issue turns on the significance of that absence and on whether the Heitlands sustained their burden (citation omitted), of proving that it did not meaningfully interrupt the continuity of their presence." 551 F.2d at 500.

This is the same test used by the court below in reaching its decision.

While it is true that the *Heitland* court applied the same three factors which this Court used in *Rosenberg v. Fleuti, supra*, to determine the significance of the departure; namely, whether the departure was innocent, casual and brief, it was not required to do so by this Court's holding in that case. This Court in *Rosenberg v. Fleuti, supra*, held only than an innocent, casual and brief excursion by a resident alien did not interrupt his resident status. This Court stated that these are relevant factors, but did not conclude that they were determinative nor exclude the possibility that other factors might be just as relevant in determining the significance of the departure.

The court below applied the same *Fleuti* test, but concluded that, based on the facts of the case, factors other than the "innocent, casual and brief" factors were more relevant to the significance of the alien's departure. The Ninth Circuit held only that in light of the fact that the hardship which the alien would suffer upon deportation was undiminished by the departure, that the departure could not be considered significantly interruptive of the seven year period. Nothing in *Rosenberg v. Fleuti, supra*, precluded

the court from using such a factor in determining the significance of the departure. Thus, the court below applied the same law as did the Second Circuit in *Heitland v. INS, supra*, finding only that different factors present in the alien's case were determinative of the significance of the departure.

Respondent finds support for its position in Judge Kaufman's dissent in *Heitland*, who would hold on the facts presented in that case, that the Heitlands' departure did not meaningfully interrupt their seven year presence. Apparently he would have used factors more relevant than the majority's rigid application of the "innocent, casual and brief" factors used by this Court in *Rosenberg v. Fleuti, supra*.

Petitioner also states that the decision below is in conflict with the Fourth Circuit's decision in *McColvin v. INS*, 648 F. 2d 935 (4th Cir. 1981). Although the *McColvin* court states that it believes Congress intended a restrictive interpretation of the seven year continuous physical presence requirement, it nevertheless decided the case based on the factors enunciated by the Ninth Circuit in *Kamheangpatiyooth*. The *McColvin* court held that the alien's departure, because it was a statutory voluntary departure in lieu of actual deportation, was sufficiently significant to interrupt the alien's continuous presence. Applying the first *Kamheangpatiyooth* test, the court held that the hardship would be diminished by the departure, since the alien had accepted the grant of voluntary departure and, therefore, should not have harbored any expectations of returning to continue an uninterrupted residence in the United States. Applying the second *Kamheangpatiyooth* test, the court found that there was a significant increase in the likelihood of deportation, since, had the alien not left of his own accord, he would have been forcefully deported by the Immigration and Nat-

uralization Service. Regardless of its *dicta* to the contrary, the Fourth Circuit decided *McColvin* using the Ninth Circuit formulation found in *Kamheangpatiyooth*. Petitioner's argument that the holding of the Courts of Appeals in the different circuits deciding the issue of continuous physical presence are in conflict is spurious.

The Ninth Circuit in Its Decisions on the Issue of "Significant Interruption" Is Not in Conflict With the Decision of the Supreme Court in *Rosenberg v. Fleuti, Supra*, on the Same Issue in That This Court Did Not Intend That Any Subsequent Court Be Limited Solely to the Factor Enumerated in *Fleuti*.

The decisions of the Ninth Circuit in *Kamheangpatiyooth v. INS, supra*, and in this case below are not in conflict with this Court's decision in *Rosenberg v. Fleuti, supra*.

Petitioner correctly states that since the Ninth Circuit's decision in *Wadman v. INS, supra*, the principles laid down by this Court in *Rosenberg v. Fleuti, supra*, have been applied to the continuous physical presence requirement of 8 U.S.C. §1254(a)(1). In *Wadman*, the Ninth Circuit stated that

> "The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816.

As has been discussed, *infra*, the holding of this Court in *Rosenberg v. Fleuti, supra*, was not that the three factors found to be relevant in that case be rigidly applied to all subsequent cases. Rather, this Court held that the ultimate test is whether the departure can be ". . . regarded as meaningfully interruptive . . ." 374 U.S. at 462.

Under the facts of the *Fleuti* case, this Court stated that the relevant factors to be considered to determine whether

the alien's departure was meaningfully interruptive were the length of time the alien was absent from the United States, the purpose of the departure, and whether travel documents were procured. This Court concluded by clarifying that these factors would not operate in all cases, and that factors other than these three would be the relevant factors in other cases.

> "Although the operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion', (citation omitted), we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status . . ." 374 U.S. at 462.

Clearly, this Court did not intend, by its decision in *Fleuti*, to enumerate the only factors which may be considered in determining whether a departure is "meaningfully interruptive".

The Ninth Circuit, in *Kamheangpatiyooth*, correctly identified the function of the seven year continuous physical presence requirement of 8 U.S.C. §1254(a)(1):

> "It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh [footnote omitted]." 597 F.2d at 1256.

Concerning departures during the seven year period such as the one which is at issue in this case, the court further stated,

> ". . . interruptions that are brief and infrequent *do not diminish the probability that deportation would oc-*

> *casion undue hardship*. An alien who leaves the country briefly and for innocent reasons during the requisite seven years *may be in no different position*, realistically viewed, than an alien who has remained within the borders for an identical period." 597 F.2d at 1257 [emphasis added].

In view of the remedial purpose of 8 U.S.C. §1254(a)(1) to ameliorate the hardship of deportation in appropriate cases, and the purpose for the inclusion of the seven year physical presence requirement to assure that the alien has established sufficient roots, the *Kamheangpatiyooth* court determined that one very relevant factor to be considered in this context is

> ". . . whether a particular absence during the seven year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion." 597 F.2d at 1257.

Nothing in this formulation of the "meaningfully interruptive" standard is in conflict with this Court's holding in *Fleuti*. Nor does the court's decision in this case below conflict with this Court's decision in *Fleuti;* it merely applied the *Kamheangpatiyooth* test regarding the evidentiary factors to be considered in determining the significance of the alien's departure to the facts of this case.

The Issue for Which Petitioner Seeks Review Is Not the Holding of the Court Below.

The issue for which Petitioner seeks review by this Court is not properly presented by the holding of the Ninth Circuit decision in the case below. Petitioner, by its Petition for Writ of Certiorari, in fact desires this Court to review the Ninth Circuit's decision in ***Kamheangpatiyooth*** *v.* ***INS***, *supra*, which is not before the court at this time.

Petitioner seeks review of the *Kamheangpatiyooth* decision, insofar as it held that an absence could not be significantly disruptive of the seven year continuous physical presence if ". . . indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred . . ." 597 F.2d at 1257. Although the court below cited *Kamheangpatiyooth v. INS, supra,* and adopted its analysis of the continuous physical presence requirement, it can not be said that the court below held that that one factor by itself is determinative of the significance of the departure.

Rather, the decision of the court below was to reverse the decision of the Board of Immigration Appeals ["BIA"] and remand the case for further consideration because the BIA had considered only one factor in its determination that the alien's absence was meaningfully interruptive of her continuous physical presence. The BIA had made its determination solely on the basis of a finding that the alien had, by her departure, substantially increased the likelihood of deportation. This factor is only one of the relevant factors to be considered according to the *Kamheangpatiyooth* decision. In the instant case, the court below stated that the correct application of the *Kamheangpatiyooth* decision is

> ". . . to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement." (Petitioner's App. A, p. 6a.).

Further, the court stated that,

> "By relying exclusively on the fact that Mrs. Phinpathya increased her risk of deportation by her absence, the BIA treated that factors [sic] as 'the object of the inquiry', and failed to view the circumstances in their totality and in light of the underlying Congressional purpose." (Petitioner's App. A, p. 7a).

The holding of the court below is that the Board of Immigration Appeals used an "erroneous standard" in determining the significance of the alien's departure in that it relied on one factor and one factor only in its determination. The correct standard, according to the court, and which is in no way in conflict with this Court's decision in *Fleuti*, is that all relevant circumstances should be viewed in their totality and with the underlying Congressional purpose in mind. The court below did not hold, as Petitioner asserts, that an alien's absence may never be considered meaningfully interruptive of the seven year continuous physical presence requirement if the hardships associated with the alien's departure would be as severe as if the absence had not occurred. Petitioner's request to have the Ninth Circuit's decision in *Kamheangpativooth v. INS, supra*, reviewed by way of a Writ of Certiorari in this case, should not be granted.

The Question Presented by Petitioner Is Not of Sufficient Public Importance in the Context of Suspension of Deportation to Warrant Review by the Supreme Court.

The issue presented by Petitioner in its Petition for Writ of Certiorari is not of sufficient public importance to warrant review by this Court. In the suspension of deportation context [8 U.S.C. §1254(a)(1)], the issue is rarely a decisive one, as the vast majority of suspension cases are denied based on the failure of the alien to establish to the satisfaction of the Attorney General that his deportation would result in extreme hardship.

While it is true that seven years continuous physical presence is a statutory requirement which must be met before the alien's case may be further considered for the exceptional remedy of suspension of deportation, allowing questionable

cases to be resolved in favor of the alien in no way reduces the exceptional nature of the remedy, see *Wadman v. INS*, 329 F.2d at 817, and *Kamheangpatiyooth v. INS*, 597 F.2d at 1256 footnote 3, since the Attorney General must still determine whether deportation would result in extreme hardship. This last requirement is the heart of the suspension of deportation remedy, and that which insures that suspension will be granted in only truly exceptional and deserving cases.

The public interest is not served by this Court's review of an issue which is rarely determinative of applications for relief under 8 U.S.C. §1254(a)(1). If, as Petitioner asserts, this issue is of sufficient importance in that it will cause ". . . substantial repercussions beyond the suspension of deportation context," (Petitioner's Brief, p. 9), Respondent suggests that the issue be reviewed in a different context where the issue is significant to the final determination of the entire case.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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